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No. 82-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER, ET AL.,
Petitioners,

v.

CLYDE ALLEN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF FOR THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, THE NATIONAL PARENT TEACHER ASSOCIATION, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Committee for Public Education and Religious Liberty, The National Parent Teacher Association, The American Federation of Labor and Congress of Industrial Organizations, and The American Jewish Congress, move this Court for leave to file the accompanying brief *amici curiae* in support of petitioner.

INTEREST OF THE *AMICI CURIAE*

The National Committee for Public Education and Religious Liberty is a national coalition of organizations [1]

[1] The constituents of National PEARL are: American Association of School Administrators; American Civil Liberties Union;

sharing the common objectives of preserving religious freedom and separation of church and state in public education. It has participated in numerous cases challenging aid to parochial schools as a party or an *amicus*.

The National Parent Teacher Association is a voluntary organization of parents and teachers formed to promote the well-being of children and the viability of public education. The work of the National PTA is carried on principally through its approximately 29,000 local parent-teacher associations, which have a membership in excess of 6,000,000. The National PTA is committed to maintaining the separation of church and state in public education.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 99 national and international unions having a total membership of approximately 14,000,000 working men and women; hundreds of thousands of those men and women are employed in schools and other educational institutions.[2] The labor movement has long been dedicated both

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ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; and Unitarian Universalist Association.

[2] A majority of these employees are represented by the American Federation of Teachers. In addition, the following AFL-CIO affiliates represent a substantial number of school empolyees: the American Federation of State, County and Municipal Employees;

to advancing the cause of public education in this country and to maintaining the separation of church and state.

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the freedoms secured by the First Amendment, and especially the freedoms secured by its Establishment and Free Exercise clauses.[3]

REASONS FOR GRANTING THE MOTION

The *amici curiae* are committed to the viability of the Establishment Clause to the Constitution and the integrity of the American public school system. They file this brief because both are endangered by the decision below.

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the American Federation of School Administrators; the International Union of Operating Engineers; and the Service Employees International Union.

[3] The American Jewish Congress files this brief for itself and on behalf of the following other national organizations of American Jews which share its commitment: American Jewish Committee; Jewish Labor Committee; Union of American Hebrew Congregations; Women's American ORT; Anti-Defamation League of B'nai B'rith and Women's League for Conservative Judaism.

In addition, the American Jewish Congress files the brief on behalf of the following local organizations of American Jews: Jewish Federation of Palm Beach County; Jewish Federation of Greater Des Moines; Jewish Community Relations Council of St. Louis; Jewish Community Relations Council of the Jewish Federation of Southern New Jersey; Jewish Community Council of Metropolitan Detroit; Jewish Federation of Greater Seattle; Jewish Community Federation of Metropolitan New Jersey; Jewish Federation of Greater Kingston, New York; Sarasota Jewish Federation, Florida; Flint Jewish Federation, Michigan; Jewish Community Relations Council of the Youngstown Area Jewish Federation; Indianapolis Jewish Community Relations Council; Jewish Federation of St. Joseph Valley, Inc., Indiana; Jewish Community Relations Council of Dayton; Jewish Community Relations Committee of El Paso; Jewish Community Relations Council of Greater San Jose; Milwaukee Jewish Council; and Jewish Community Relations Council of Greater Philadelphia.

It is the thesis of this brief that, whatever its appearance, the Minnesota "dependent education expense" necessarily constitutes special legislation for parents who do not enroll their children in public school—principally because they want their children to receive a sectarian education.[4] *Amici* respect the right of parents to choose such an education for their children, but they submit that the Minnesota statute unconstitutionally subsidizes that choice in violation of the Establishment Clause.

CONCLUSION

For the foregoing reasons, the motion for leave to file the accompanying brief *amici curiae* should be granted.[5]

Respectfully submitted,

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[4] Nationally, 84% of the students who attend nonpublic schools attend schools that are religiously affiliated. *See* National Center for Educational Statistics, *A Comparison of Selected Characteristics of Private and Public Schools*, at 2, 8 (1982). In several of the cases that have come to this Court—including the instant case, *see* p. 2, *infra*—the percentage has been even higher. *E.g.*, *Sloan v. Lemon*, 413 U.S. 825, 830 (1973) (90%); *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (96%).

[5] Although this motion and the accompanying brief are being filed (by hand) one day after petitioners' brief was filed (by mail), the motion and brief are being filed "within the time allowed for the filing of the brief" of petitioners. Sup. Ct. R. 36.2 Accordingly, the motion and brief are timely. *See also id.* R. 36.3

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This *amici curiae* brief is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Minnesota, as does every other state, provides a system of public education at taxpayer expense to children of elementary and secondary school age. Minn. Stat. §§ 120.06, 120.72. In addition to this system of public schools, there are in Minnesota over 500 schools which are

privately supported. More than 90% of these nonpublic schools are sectarian. During the 1979-80 school year, there were 90,954 students enrolled in nonpublic schools in Minnesota; over 96% of these students were enrolled in sectarian schools (JA 32-33).

Minn. Stat. § 209.02(22) authorizes a taxpayer who incurs certain expenses in sending a child to an elementary or secondary school to deduct those expenses, up to specified maxima, from adjusted gross income in computing his or her state income tax. Three categories of expenses are deductible: (1) tuition; (2) textbooks (defined to "include books and other instructional materials and equipment"); and (3) transportation (defined to include transportation for field trips and to and from school).

The State estimates that in 1980, 86,180 taxpayers took advantage of this deduction, reducing their gross income by approximately $32,000,000. The State forfeited roughly $4,100,000 in revenue as a result.[1]

The constitutionality of a law of this type presents no novel issues to this Court. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and a line of subsequent decisions, this Court has invalidated a variety of similar laws. The teaching of *Nyquist* (and its progeny) is clear: laws which provide special benefits primarily to sectarian school parents—and hence to sectarian schools—and which are not restricted so as to aid only the secular activities of such schools violate the Establishment Clause (pp. 5-7, *infra*).

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[1] These estimates are contained in Minnesota Department of Revenue, Individual Income Tax Sample at 94 (July, 1982). This is a public report of an analysis done by the Department of Revenue on a sample of 20,351 tax returns. *See also Washington Post*, May 1, 1982 at A-3.

In 1980, when the record in this case was compiled, the State estimated that it was forfeiting $2,500,000 in revenue annually as a result of the deduction. (JA-5).

This principle is dispositive here. Like the law struck down in *Nyquist*, the Minnesota deduction for "tuition," which we analyze in Part A, and for "textbooks," which we analyze in Part B, provide a special and unrestricted benefit to sectarian schools since those deductions apply principally to expenses that are not for secular items and that are unique to nonpublic schools. The same is true with respect to the deduction for "transportation" insofar as it applies to transportation for field trips although not insofar as it applies to transportation to and from school (Part C). Thus, the tuition and textbook deduction, and at least part of the transportation deduction, provided for by the Minnesota law should be struck down as "respecting an establishment of religion." [2]

ARGUMENT

"The controlling constitutional standards" for determining whether a law violates the Establishment Clause are by now "firmly rooted," *Committee for Public Education v. Nyquist*, 413 U.S. 756, 761 (1973). Over a decade ago, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court set forth a three-part test for making such determinations:

> First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster "an excessive government entanglement with religion." [*Id.* at 612-13; citations omitted]

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[2] "[The authors] of the First Amendment did not simply prohibit the establishment of a state church or a state religion. . . . Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization . . . A given law might not *establish* a state religion but nevertheless be a law 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis in original)

In a line of subsequent cases this Court has applied the *Lemon* test to invalidate a variety of schemes designed to provide financial relief for parents who choose to send their children to private schools.[3] The seminal case in this line is *Committee for Public Education v. Nyquist, supra,* which particularizes the *Lemon* test for application to the law involved here.

Nyquist involved a challenge to a New York law which created a two-part program of assistance for parents of children attending nonpublic schools. For low-income parents (those with incomes under $5,000), the law provided a cash reimbursement for a percentage of the parent's expenditure for nonpublic school tuition up to certain maxima. 413 U.S. at 764. For middle-income parents (those with incomes under $25,000), the law authorized a state income tax deduction, in a statutorily-prescribed amount, for children for whom the parent had expended at least $50 for nonpublic school tuition; the permitted deduction varied with the parent's income and was "carefully calculated in advance," *id.* at 766, so as to yield tax benefits of up to $50 per child, the minimum amount the parent was required to have expended on tuition to qualify for the deduction. This Court found both parts of the New York program unconstitutional under *Lemon.*

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[3] *Committee for Public Education v. Nyquist, supra*; (cash reimbursements and tax deductions); *Sloan v. Lemon*, 413 U.S. 825 (1973) (cash reimbursements); *Wolman v. Walter*, 433 U.S. 229 (1977) (in-kind loan of instructional materials); *Wolman v. Essex*, 409 U.S. 808 (1972), *aff'g*, 342 F. Supp. 399 (S.D. Ohio) (cash reimbursement); *Byrne v. Public Funds for Public Schools*, 442 U.S. 907 (1979), *aff'g*, 590 F.2d 514 (3rd Cir.) (tax exemption); *Franchise Tax Board v. United Americans for Public Schools*, 419 U.S. 890 (1974), *aff'g*, No. C-73-0090 (N.D. Cal.) (tax credit); *Grit v. Wolman*, 413 U.S. 901 (1973), *aff'g*, 353 F. Supp. 744 (S.D. Ohio) (same). *See also Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (tax deduction).

In analyzing the effect of the New York law, the Court viewed the grants and deductions to be, in substance, direct aid to sectarian schools:

> [I]t is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. . . . [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions. [*Id.* at 783] [4]

The Court went on to find this "financial support" impermissible under the "effect" branch of the *Lemon* test. The Court emphasized two factors. First, the grants and deductions constituted "[s]pecial tax benefits," *id.* at 793, which were being provided "to a class composed . . . predominantly of religious institutions," *id.* at 794. Second, these "special tax benefits" were not restricted so as to "guarantee[] that the state aid . . . will be used exclusively for secular, neutral, and nonideological purposes," *id.* at 780. Consequently, the grants and deductions "'represent[ed] a charge made upon the state for the purposes of religious education,'" *id.* at 791—a charge which could "have the impermissible effect of advancing the sectarian activities of religious schools," *id.* at 794. The Court added:

> In its attempt to enhance the opportunities of the poor to choose between public and nonpublic educa-

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[4] The Court made the same point in *Sloan v. Lemon*, *supra*:

> The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. [413 U.S. at 832]

> tion, the State has taken a step which can only be regarded as one 'advancing' religion. However great our sympathy for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline,' and notwithstanding the 'high social importance' of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted. [*Id.* at 788-89; citations omitted]

The *Nyquist* Court found that the New York law raised a problem of constitutional dimension under the third branch of the *Lemon* test as well. In *Lemon*, the Court had warned that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect," 403 U.S. at 622,[5] and that "[t]he potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow," *id.* at 623. The *Nyquist* Court concluded that the New York law "carrie[d] grave potential for entanglement in the broader sense of continuing political strife over aid to religion," 413 U.S. at 794:

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[5] The Court in *Lemon* added:

> The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divided on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. . . . The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief. [403 U.S. at 622-23; citations omitted]

> The language of the Court [in *Lemon*] applies with peculiar force to the New York statute now before us. . . . [T]hese programs start out at modest levels . . . . But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored. [*Id.* at 796-98; citations omitted]

Nyquist thus teaches that a tax benefit that "flow[s] primarily to the parents of children attending sectarian, nonpublic schools," 413 U.S. at 794, and is not restricted to the secular functions of such schools violates the Establishment Clause. As we proceed to show, this principle, which subsequent to *Nyquist* has been applied by this Court on seven separate occasions to invalidate a variety of plans for channeling state aid to sectarian-school parents,[6] likewise requires the invalidation of Minnesota's

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[6] *See* cases cited n.3, *supra*. In these cases, of course, the state aid, while primarily benefiting sectarian-school parents, was not limited to such parents; rather in each case the aid at least was provided to all nonpublic school parents. And in *Grit v. Wolman*, 413 U.S. 901 (1973), *aff'g*, 353 F. Supp. 744 (S.D. Ohio), the Ohio law held unconstitutional provided a tax credit to all parents, "who expend money in excess of that spent generally by public school parents for specialized services such as remedial training adult education," 353 F. Supp. at 759-60.

tax deduction for tuition and textbooks and at least the partial invalidation of the deduction for transportation.

A. The Deduction for "Tuition"

The initial—and by far the most significant—item of deduction authorized by Minn. Stat. § 290.09(22) is for tuition. With regard to this deduction, the similarities between the Minnesota law and the legislation invalidated in *Nyquist* are manifest. Here, as in *Nyquist*, it is "precisely the function" of the Minnesota tuition tax deduction "to provide assistance to private schools" by "assur[ing] that [parents] continue to have the option to send their children" to such schools (p. 5, *supra*); indeed, the State acknowledges that this is its aim.[7] Here, as in *Nyquist*, the "great majority" of private schools aided by the deduction are sectarian; the record establishes that over 90%

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[7] In both the district court and the court of appeals, the State argued that the tuition tax deduction advanced its purpose of "assist[ing] Minnesota taxpayers in providing dependents with a safe, effective and varied educational environment" (*see* Pet. App. A-7 (district court's statement of the State's argument); Pet. App. A-70 (appellate court's statement of State's argument)).

The Minnesota Supreme Court has found this same aim to underly other measures the State has adopted during the past decade. In *Minnesota Civil Liberties Union v. State*, 224 N.W.2d 344 (Minn. 1974) *cert. denied*, 421 U.S. 998 (1975), the court explained as follows the aim of a tuition tax credit law it held invalid:

> The 1971 session of the Minnesota Legislature addressed itself to the problem of the financial plight of the parents exercising their constitutional right to send their children to nonpublic schools. It sought a means to reduce their burden to promote the state interest in maintaining such plurality of educational opportunity and to prevent the demise of such nonpublic schools, with the substantial burden being immediately cast upon the taxpayers of the state. [*Id.* at 345]

See also Americans United Incorporated v. Independent School District No. 622, 179 N.W.2d 146, 154 (Minn. 1970) (Minnesota statute authorizing the loan of textbooks to nonpublic schools intended "to grant some economic relief to those who attend parochial schools").

of the nonpublic schools in Minnesota are sectarian, and that over 96% of the students enrolled in nonpublic schools are enrolled in sectarian schools (p. 2, *supra*). And here, as in *Nyquist*, the deduction is not "restricted" to assure that only the secular activities of sectarian schools are supported.

Despite the similarities between the instant law and the *Nyquist* law in these critical respects, the court below nonetheless thought *Nyquist* distinguishable. Because the New York law authorized a deduction only for *nonpublic* school tuition whereas the Minnesota law is not so restricted, the appellate court concluded that the Minnesota statute is "neutral on its face," has not "singled out a class of citizens for a special economic benefit," and provides "substantial benefits . . . to all members of the public" (Pet. App. A-44 to A-45, A-52).[8] The attempted distinction cannot withstand analysis.

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[8] The court of appeals suggested a second distinction of *Nyquist*: "the statute in *Nyquist* operated as a tax credit," Pet. App. A-41, whereas the Minnesota statute provides a "true deduction," *id.*, whose benefit "is more diffused and less certain" since "whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayer from a higher tax bracket to a lower one," *id.* at A-47. This distinction is doubly flawed.

First, and most fundamentally, the Court in *Nyquist*, in finding that the effect of the New York law was to advance religion and that the law posed a risk of continuing strife along religious lines, did not in any way rely on the fact that under the New York law, the "deduction" was in a statutorily prescribed amount (rather than for the expenses actually incurred by the parents). Indeed, the *Nyquist* Court expressly refused to be drawn into the dispute the parties had waged over labeling the New York law, explaining that "the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. . . . [C]onstitutional analysis is not a 'legalistic minuet in which precise rules and forms must govern.'" 413 U.S. at 789-90, *quoting Lemon v. Kurtzman*, *supra*, 403 U.S. at 614. The Court in *Nyquist* focused on the substance of the New York law, and found that since, in substance, the tax reduction "represents a charge made upon the state for the purpose of religious education," 413 U.S. at 791, it was unconstitutional. Thus,

To begin with, the court below's reliance on the facial neutrality of the Minnesota statute is misplaced. The fact that a statute may be neutral as between parents of public school and nonpublic school children is irrelevant for purposes of Establishment Clause analysis; under that Clause, the determinative question is whether there is neutrality as between religion and non-religion. And that question cannot be resolved simply by examining a statute on its face. The *Lemon* test is not necessary to establish that a law which, by its terms, advantages religion over non-religion is unconstitutional. The test exists principally to judge laws—such as the law considered in *Nyquist*—which, on their face, are neutral between religion and non-religion, but which nonetheless may have an unconstitutional purpose or effect. *Cf. Larson v. Valente*, 50 U.S.L.W. 4411, 4417 (U.S. 1982). In short, the facial neutrality of the tuition deduction in the Minnesota law does not establish its constitutional validity.

When the *effect* of the Minnesota tuition deduction is examined, it becomes readily apparent that the "neutrality" of the deduction is not even skin-deep. At the

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the fact that Minnesota has enacted a true tax deduction, rather than a hybrid, provides no principled basis for distinguishing *Nyquist*.

Second, even if *arguendo* the certainty with which a law provides a sectarian benefit were of constitutional significance, the Minnesota law would not be saved, for the benefit of the Minnesota deduction is not nearly so uncertain as the court below suggested. Minnesota has a progressive state income tax. Minn. Stat. § 290.06(2c). Taxpayers with adjusted gross incomes under $20,000 determine their taxes by use of a tax table; the table divides adjusted gross income into $50 "steps," so that the tax owed decreases for every $50 that adjusted gross income is reduced. Thus, a taxpayer with an adjusted gross income under $20,000 who claims the tuition deduction is guaranteed to realize a tax benefit so long as the deduction is for $50 or more. And taxpayers with adjusted gross incomes over $20,000 will realize a tax benefit from any tuition deduction they claim, since taxpayers in these income brackets cannot use a tax table to determine their taxes but rather pay a percentage of their adjusted gross income in taxes.

time the Minnesota statute was amended in 1976 to raise the maximum deductions, the Minnesota Department of Revenue prepared a "Revenue Analysis." Based upon its twenty years of experience in administering the deduction, the Department stated: "Only those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law since tuition . . . expenses for public school students are paid for by the school district."[9] Subject to *de minimis* exceptions discussed below (pp. 12-14 & n.10, *infra*), that statement is undeniably true.

The public school system in Minnesota makes education at public expense neutrally available to all school-age children. By law, "[a]dmission to a public school is free to any person [of school age] who resides within the district," Minn. Stat. § 120.06.[10] Thus, the only parents who pay tuition in its ordinary sense, *i.e.* a fee to enable a child to attend school, are those who elect not to avail themselves of this system of public education—principally those who desire a sectarian education for their children. Consequently, as in *Nyquist*, the tuition deduction necessarily provides a special benefit to these

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[9] The 1976 Revenue Analysis is reprinted as Appendix A. An earlier Revenue Analysis, prepared in 1975 when the bill was pending before the legislature, contains the same statement.

[10] If a student attends a public school outside of the district in which he resides, tuition may be charged. Under Minnesota law, the district in which the student resides is authorized (and in certain circumstances obligated) to pay the tuition, *see* Minn. Stat. § 120.08, but there may be situations in which the parent pays the tuition.

The record reveals that in 1977-78, only 40 students attended public schools within the State of Minnesota but outside of the district in which they resided and in 1978-79, only 79 students did so (JA 34-35); the record does not indicate for how many of these students tuition was charged and *a fortiori* does not indicate to what extent, if any, tuition was paid by the parents rather than by the home district.

parents; indeed, that is its very purpose.[11] For this reason, the deduction cannot be sustained, as other benefits have been, on the ground that the deduction is a " 'public benefit[] that [is] 'neutrally available to all,' " *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 746 (1976).[12]

In light of the above, the question becomes whether the tuition deduction can be upheld despite the fact that it provides a special advantage to sectarian-school parents. The court below placed great weight on the fact that subsequent to the preparation of the Revenue Analysis referred to previously, the Minnesota Department of Revnue has interpreted the term tuition to include not only "tuition in the ordinary sense"—which only nonpublic school students pay—but also four *other* fees which are separate from, and in addition to, tuition in the ordi-

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[11] If the State wished simply to reduce the tax burden of all parents of school-age children it could do so without a tuition deduction by, e.g., increasing the exemption for school-age dependents. Such an across-the-board exemption would be "neutrally available to all" and would not be unconstitutional simply because sectarian school parents would benefit from it.

[12] *See also e.g., Widmar v. Vincent*, 50 U.S.L.W. 4062, 4065 (U.S. 1981) ("The provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect"); *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970) (upholding exemption of religious institutions from property tax as part of exemption extended to "a broad class of property owned by nonprofit, quasi-public corporations"); *Americans United for Separation of Church and State v. Blanton*, 434 U.S. 803 (1977), *aff'g*, 433 F. Supp. 97 (M.D. Tenn.) (upholding law providing scholarship to needy students to attend college or university of their choice, including a sectarian college). *See also Meek v. Pittinger*, 421 U.S. 349, 364 (1975) (dictum) ("as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches and public health facilities—secular and nonideological services"); *Lemon v. Kurtzman*, *supra*, 403 U.S. at 616; *Tilton v. Richardson*, 403 U.S. 672, 687 (1971).

nary sense: (i) fees for necessary remedial instruction;[13] (ii) fees for in-home instruction provided by a school to a handicapped child; (iii) fees for private instruction if the instruction is acceptable for academic credit by a public or private elementary or secondary school; and (iv) fees for driver education when offered for academic credit by a secondary school.[14] As we show, the deductibility of these four fees cannot save the tuition deduction.

Neither the court below (nor the district court) took note that under the Minnesota Education Code, public schools are precluded from charging for the first two

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[13] The lower courts found (Pet. App. A-5 to A-6, A-62 to A-63) that "tuition" includes "[c]ertain summer school tuition" and "[t]uition charged by a school for slow-learner private tutoring services." These findings are based upon a Minnesota Department of Revenue Office Memorandum, which is in the record (JA 21, 22), and which states that "Summer school to keep up with classmates" is deductible and that "private tutoring for slow learners to keep up with classmates" is deductible "if tuition [is] charged by the school."

[14] The lower courts (Pet. App. A-5 to A-6, A-62 to A-64) listed two other categories of deductible expenses under the "tuition" rubric: "Montessori School tuition for grades K through 12" and "tuition [paid by] public school students who attend public school outside their residence school district." These expenses are simply forms of "tuition in the ordinary sense" charged by particular types of schools; the inclusion of these expenses as deductible does not alter the fact that the overwhelming majority of parents paying "tuition in the ordinary sense" are sectarian-school parents. *See also* n.10, *supra*.

In *Grit v. Wolman*, *supra*, the Ohio statute provided credits for parents paying nonresident public school tuition, nonpublic school tuition (including Montessori school tuition), and other forms of tuition as well. *See* n.6, *supra*. Notwithstanding that fact, this Court summarily affirmed the three-judge court's decision holding the law unconstitutional. Significantly, although the three Justices who dissented in *Nyquist* stated in *Grit* that they would have reversed the decision below for the reasons expressed in their *Nyquist* dissent, no member of the Court suggested that the inclusion of a broader class of recipients of tax credits provided a basis for distinguishing *Nyquist*.

items, remedial instruction and in-home instruction for the handicapped,[15] so that these deductions actually represent additional, special benefits for sectarian schools. Thus, the only benefit that the tuition deduction makes "neutrally available to all members of the public" is a deduction for the cost of private instruction where the private instruction qualifies for academic credit, and the cost of driver education, when offered on a fee basis for academic credit, by a secondary school. Two separate lines of analysis show that the inclusion of these two fees in the tuition deduction provision does not save that provision.

(a) The Establishment Clause, as *Nyquist* teaches (p. 7 *supra*), prohibits states from providing special and unrestricted benefits to sectarian institutions. That prohibition cannot be circumvented by the simple expedient of grouping together such a benefit with *other* benefits that are neutrally available to all (or that are limited to non-sectarian institutions). To assure the integrity of the Establishment Clause, each benefit must be separately analyzed under the *Lemon* test, as this Court repeatedly has done, and each benefit must stand or fall on its in-

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[15] Minn. Stat. § 120.72 permits school boards to charge only for "areas considered extracurricular, noncurricular or supplementary to the requirements for the successful completion of a class or educational program." By special authorizing legislation, fees may be charged for driver education, Minn. Stat. § 171.04(1), and for community education programs offered in the summer, Minn. Laws of 1982, ch. 548 art. 6, § 1. But no special authorizing legislation exists—and hence no fee may be charged—for necessary remedial instruction or for instruction of the handicapped; indeed, with respect to the education of the handicapped, Minnesota law expressly requires that school boards furnish, at public expense, "the special instruction and services which are appropriate to the [handicapped child's] needs," Minn. Stat. § 120.17(3a). *See also* 5 Minn. Code of Agency Rules § 1.0120(A); Rules of the Minnesota Board of Education, EDU § 700.04.

dividual merits.[16] Indeed, were the rule otherwise, the constitutionality of a particular benefit would turn not on the substance of the benefit but on the package in which it is contained. The constitutionality of a benefit thus could vary from case to case depending upon whether it is stated separately or grouped with other benefits.

(b) Even if, *arguendo*, a special and unrestricted benefit to sectarian institutions under some circumstances could survive constitutional scrutiny if combined with other neutral benefits, this certainly could not be the result where, as here, the total package so obviously advantages religion. The "neutral" benefits provided by the Minnesota tuition deduction—a deduction for driver education fees and for private instructional fees (when the driver education or private instruction yields academic credit)—are minimal, and are far outweighed by the special benefit for sectarian institutions—a deduction for tuition in the ordinary sense and for fees charged for in-home instruction and for necessary remedial education.[17]

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[16] For example, in *Wolman v. Walter*, 433 U.S. 229 (1977), this Court upheld large portions of the law at issue there, including the loan of texts to sectarian schools, *id.* at 234-36, the purchase of standardized tests for sectarian schools, *id.* at 238-40, the provision of diagnostic speech, hearing, and psychological services to sectarian-school students, *id.* at 240-43, and the provision of remedial services (off school premises) to sectarian-school students, *id.* at 244-48. Yet notwithstanding the validity of these benefits, the Court separately analyzed—and found unconstitutional—the loan of instructional material to sectarian-school students, *id.* at 248-50, and the provision of transportation for sectarian-school field trips, *id.* at 252-55. *See also Meek v. Pittinger*, 421 U.S. 349 (1975).

[17] The record does not allow a definitive quantification of the relative benefits. But it is clear that sectarian school tuition is costly; the national average is $420 for a sectarian elementary school and $976 for a sectarian high school. U.S. Department of Commerce, Bureau of the Census, *Private School Enrollment, Tuition and Enrollment Trends: October, 1979* at p. 27. In contrast, the total amount received by Minnesota public schools in 1978-79

The illogic of the lower court's reasoning is highlighted by assuming that, instead of forfeiting revenue through a tuition deduction, the State chose to expend revenues for the same purposes by reimbursing nonpublic school parents for their full cost in sending their children to nonpublic schools, *i.e.* for tuition in the ordinary sense and the four deductible fees, and by reimbursing all other parents for the full cost of their items of expense that are deductible as tuition under Minnesota's law, *i.e.*, private instruction and driver education. If, as the court below reasoned, the Minnesota tuition deduction provides benefits neutrally to all, it necessarily would follow that the hypothesized reimbursement arrangement likewise would pass constitutional muster. Yet that result, as *Nyquist* states, would be "wholly at variance with the Establishment Clause." 413 U.S. at 782 n.38.

In sum, the Minnesota deduction for tuition provides a special benefit to sectarian schools which is not restricted to the secular activities of those schools. As in *Nyquist*, that special benefit has the "direct and immediate effect of advancing religion," *id.* at 784 n.39, and "carries grave potential for . . . continuing political strife over aid to religion," *id.* at 794.[18] The tuition

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for a budgetary line item denominated as "tuition"—not all of which is necessarily deductible— was $2.46 per public school student ($2,005,142 total) (JA 36-38).

[18] Indeed, events in Minnesota confirm the wisdom of *Nyquist*'s warning (p. 7, *supra*) that "aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies," thereby exacerbating the potential for continuing political strife. The tax deduction at issue here was first enacted in Minnesota in 1955, *see* Ch. 741, 1955 Minnesota Laws; it provided a deduction for a maximum amount of $200 for each dependent. In 1976, bills were introduced to eliminate the maximum, HF 755 and SF 570. The Senate instead passed a bill to raise the maximum to $1,000 and the House passed a bill to raise it to $600; as a compromise, a law was enacted to raise the maximum to $500 for each elementary school child and $700 for each high school child, Ch. 37, 1976 Laws of Minnesota. In 1981, new

deduction thus violates the Establishment Clause.[19]

B. The Deduction for "Textbooks"

In addition to the tuition deduction, Minn. Stat. § 290.09(22) also permits taxpayers to deduct their expenses in acquiring "textbooks"—defined by the statute to include "books and other instructional materials and equipment"—for their elementary and secondary school children. Since this deduction, like the deduction for tuition, provides a special benefit for sectarian school parents—and hence for sectarian schools—which is not restricted to supporting the schools' secular activities, it also violates the Establishment Clause.

Insofar as the Minnesota deduction applies to textbooks "in the ordinary sense," it provides a benefit exclusively to nonpublic (*i.e.*, sectarian) school parents. Under Minn. Stat. § 120.74(1)(a), public schools are "not authorized to charge fees [for] . . . [t]extbooks [and] workbooks. . . ." Thus, only nonpublic (*i.e.* sectarian) school parents can incur costs for textbooks, and, in turn, benefit from the deduction.

Nor is this benefit restricted to supporting the secular activities of sectarian schools. Minn. Stat. §§ 123.932(1)(b) and 123.933(1) require that textbooks that are "secular, neutral and nonideological" and that "are available and are of benefit to Minnesota public school pupils" "be loaned or provided free" by the public schools to nonpublic

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legislation was introduced to double the maximum, HF 242; the Minnesota House passed an amended version of the bill, raising the maxima to $800 and $1,120. The Minnesota Senate did not act on the bill during the 1981 session.

[19] One final point should be added: If a state were to enact a separate deduction for a type of fee which can be incurred by public and nonpublic school parents alike (such as the driver education fee in Minnesota), such a deduction would likely survive constitutional scrutiny. But Minnesota has *not* enacted a separate deduction for any such fee, and thus no such question is presented here. *See also* n.25 *infra*.

school students. This means that sectarian school parents incur costs for texts—and benefit from this aspect of the textbook deduction—only to the extent their children use texts that are *not* "secular, neutral and nonideological" or are *not* "available . . . to Minnesota public school pupils."

Much the same is true of the deduction insofar as it applies to "instructional materials." The Minnesota Education Code permits public schools to make charges for instructional materials *only* in "areas considered extracurricular, noncurricular, or supplementary to the requirements for the successful completion of a[n] . . . educational program," Minn. Stat. § 120.72.[20] The tax-deduction statute, on the other hand, expressly provides that the cost of instructional materials in precisely these areas (*i.e.*, "materials for . . . extracurricular activities . . .") may *not* be deducted.[21] Consequently, the instructional material component of the Minnesota "textbook" deduction, like the textbook component, does not neutrally benefit public and nonpublic school parents alike.[22]

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[20] Thus public schools are precluded from charging for "art materials," "laboratory supplies," and "[s]upplies necessary for participation in any instructional course," *id.* § 120.74(1)(a), (b).

[21] The Minnesota Department of Revenue has interpreted this to mean that, with respect to instructional materials, "[o]nly the basic minimum required expense can be deducted" (JA 22). Thus, as the district court found (Pet. App. A-64 to A-65), the deduction for instructional materials is available for such items as "home economic materials needed to meet minimum requirements"; "special metal or wood needed to meet minimum requirements of shop classes"; and "supplies needed to meet minimum requirements of art classes."

[22] Indeed, the 1976 Revenue Analysis (p. 11, *supra*) states that the textbook deduction "affect[s] only those parents having nonpublic elementary or secondary schools since . . . textbook expenses for public school students are paid for by the school district."

Subsequent events have proven this to be a slight overstatement. Under Minn. Stat. § 120.73(1)(d), (i) and § 120.73(2),

The special benefit that the instructional materials component of the textbook deduction affords to sectarian schools cannot be justified as aiding only the secular activities of these schools. This Court has made clear that loaning instructional materials to sectarian schools (*Meek v. Pittinger*, 421 U.S. 349, 363-67 (1975)), or to their students (*Wolman v. Walter*, 433 U.S. 229, 248-50 (1977)), even though the materials are "ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity." *Meek*, *supra*, 421 U.S. at 366. Similarly, providing special tax benefits to sectarian school parents who purchase instructional materials has the same impermissible effect.[23]

Accordingly, the textbook deduction, in its entirety, violates the Establishment Clause.

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public school students—like nonpublic school students—may be required to purchase "[p]ersonal physical education and athletic equipment and apparel" and "personal or consumable items including pencils, paper, pens, erasers and notebooks," and public school students may be required to pay a rental fee for "musical instruments owned or rented by the district." The Minnesota Department of Revenue has interpreted the term "textbooks" to include these expenses, and thus in these limited respects public school parents may receive some benefit from the deduction for instructional materials (JA 17-18).

The record indicates that in 1978-79 public schools in Minnesota received $907,204 in fees (JA 36-38). The record does not indicate how much of these fees, if any, would be deductible expenses for the parents that paid them under the definition of "textbooks" contained in the tax deduction law.

[23] Indeed, in *Wolman*, *supra*, the Court expressly stated that a "grant in cash"—which is, in essence, what a deduction is—is no different, for Establishment Clause purposes, from a "grant in kind." 433 U.S. at 251. *See also Committee for Public Education v. Regan*, 444 U.S. 646, 658 (1980).

C. The Deduction for "Transportation"

Minn. Stat. § 290.09(22) also authorizes a deduction for the transportation costs incurred by a parent in connection with a child's elementary or secondary school education. This deduction applies to expenses incurred in connection with field trips if "required" by the school (JA 19), and in transporting children to school.

Insofar as the transportation deduction applies to required field trips, it benefits only nonpublic (*i.e.*, sectarian) school parents, since public schools in Minnesota are "not authorized to charge fees" for "[f]ield trips which are required as part of a basic education program or course." Minn. Stat. § 120.74(1)(c). And that benefit is not limited to the secular activities of sectarian schools. As this Court explained in *Wolman v. Walter*, *supra*, 433 U.S. at 253-54:

> [A]lthough a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.

Thus, the deduction for field trip costs violates the Establishment Clause.

The foregoing analysis does not apply to the deduction for transportation in the ordinary sense (*i.e.*, to and from school). In Minnesota public and nonpublic school parents are equally likely to incur such expenses,[24] so that this de-

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[24] Under Minnesota law, a school district is not obligated to provide transportation to and from school, but if it does, it must

duction provides a benefit that is neutrally available to all. And a deduction for ordinary transportation expenses does not aid the sectarian mission of sectarian schools. *Cf. Everson v. Board of Education*, 330 U.S. 1 (1947). It follows that, if the deduction for transportation expenses in the ordinary sense stood alone, under *Everson* it likely would be sustained.

But this deduction does not stand alone; it is coupled with the deduction for field trip expenses and, moreover, is part of a single law which provides two other deductions which, as we have shown, violate the Establishment Clause. The question thus arises whether the deduction for transportation expenses in the ordinary sense is severable.

That question, of course, is one of legislative intent: would the Minnesota legislature "have enacted [the] provision which [is] within its power, independently of [those] which [are] not." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971), *quoting Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234 (1932). We submit this question is best answered, in the first instance, by the lower courts.[25] Accordingly, if the Court finds the deduction for

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be offered without cost, *id.* § 120.74(1)(j), and the district "shall provide equal transportation within the district for all school children to any school," regardless of whether the school is public or nonpublic. Minn. Stat. § 123.78(1). Thus, transportation expenses will not be incurred by any parent whose child attends a school within the school district in which the parent resides unless the district provides no public transportation, and in that event, expenses will be incurred by public and nonpublic school parents alike.

[25] Although certain aspects of the tuition and textbook deductions are available to public and nonpublic school parents alike (*see* pp. 13-14 & n.22 *supra*), a severability question is *not* posed with regard to those two deductions. The only neutrally available aspects of those deductions are for expenses that fall far from the ordinary meaning of the terms "tuition" and textbooks"—the terms the Minnesota legislature used in enacting the deductions. Moreover, those

transportation in the ordinary sense constitutional under *Everson*, it should remand the case for the limited purpose of determining whether that deduction is severable from the remainder of the law.

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aspects of the tuition and textbook deductions that might pass constitutional muster if enacted separately are relatively insignificant *vis-a-vis* the portions that are unconstitutional. In contrast, the core aspect—and the major expense item—under the transportation deduction (*i.e.*, transportation in the ordinary sense) appears to be constitutional under *Everson*.

While recognizing that severability is a legitimate question here, we in no sense suggest that the Minnesota legislature in fact would have enacted separately the deduction for transportation in the ordinary sense. To the contrary, this deduction is but a small piece of the total dependent education expense deduction and, for essentially this reason, the First Circuit, in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), concluded that the counterpart piece in a virtually identical dependent education expense deduction statute would *not* have been enacted separately by the Rhode Island legislature.

We believe the First Circuit's analysis is applicable here as well, and that the question posed in text properly is answered in the negative. Nonetheless, because there is room for doubt on the issue, we believe that the lower courts, who have a better basis for determining what the Minnesota legislature would have done, should answer the issue in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it upholds the constitutionality of the Minnesota tax deduction for tuition, textbooks, and transportation for field trips. If the Court finds the deduction for transportation in the ordinary sense constitutional, the case should be remanded for further proceedings with respect to the severability of that component of the transportation deduction.

Respectfully submitted,

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APPENDIX

[SEAL]

STATE OF MINNESOTA
DEPARTMENT OF REVENUE
Centennial Office Building
Saint Paul, Minnesota 55145

DEPARTMENT OF REVENUE
ANALYSIS OF Laws of 1976, Chapter 37

March 15, 1976

Revenue Analysis Summary

The revenue impact resultant from Chapter 37 is an estimated decrease in individual income tax collections of about $1,200,000 in 1976. This law will affect collections in the 1976 fiscal year as it is retroactive and includes the 1975 taxable year.

Bill Explanation

Chapter 37 increases the $200 limitation for the income tax deduction for a dependent's school expenses to $500 for dependents in kindergarten and grades 1-6 and to $700 for dependents in grades 7-12.

It also includes the cost of textbooks in the allowable amount of the deduction for a dependent's school expenses. Only those taxpayers having dependents in non-public elementary or secondary schools are affected by this law since tuition, transportation, and textbook expenses for public school students are paid for by the school district. This chapter, which was signed into law on March 8, 1976, is effective for taxable years commencing after December 31, 1974.

Those taxpayers eligible for increased deductions due to this law who have already filed their 1975 income tax re-

turn will have to file an amended return in order to take advantage of the allowable increase in the deductible amount.

Revenue Analysis Explanation

This estimate is based on prior analyses of versions of bills (S.F. 570, H.F. 675) which were similar to Chapter 37 as enacted. Current nonpublic school enrollment figures were obtained from the Research Section of the Catholic Education Center for the Archdiocise of St. Paul and Minneapolis and were incorporated into this analysis.

Total nonpublic elementary and secondary school enrollment for the 1975-1976 school year is estimated at 93,900. Of this total, 60,600 are kindergarten students or are in grades 1-6 and the remaining 33,300 students are enrolled in grades 7-12. Estimates of the tuition expenses for nonpublic elementary and secondary students have not changed significantly from the 1974-1975 school year. The following table summarizes the estimated revenue loss:

	Elementary (K-6)	Secondary (7-12)
Deductions Under Proposal	$10,856,000	$14,682,000
Deductions Under $200 Limitation	9,454,000	6,088,000
Increase in Deductions	1,402,000	8,594,000
Marginal Tax Rate	10.2%	11.5%
Revenue Loss	$ 143,004	$ 988,310

The total revenue loss is estimated at approximately $1,200,000 in 1976. Increases in tuition over the next few years could result in substantial increases in the cost of the deduction.

SOURCE Minnesota Department of Revenue
Tax Research Division
March 15, 1976